

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)

MM Docket No. 99-153)

READING BROADCASTING, INC.)

File No. BRCT-940407KF)

For Renewal of License of)
Station WTVE(TV), Channel 51)
Reading, Pennsylvania)

and)

ADAMS COMMUNICATIONS CORPORATION)

File No. BPCT-940630KG)

For Construction Permit for a New)
Television Station to Operate on)
Channel 51, Reading, Pennsylvania)

To: Magalie Roman Salas, Secretary
for direction to
The Honorable Richard L. Sippel
Administrative Law Judge

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OFFICE OF THE SECRETARY

**NON-PARTY TELEMUNDO'S REPLY TO READING'S
OPPOSITION TO MOTION FOR LEGAL FEES AND COSTS**

Pursuant to the Order of this Court dated June 9, 2000 (the "Order"), non-party Telemundo Network Group, LLC ("Telemundo") hereby responds to the "Opposition to Motion for Legal Fees and Costs" filed by Reading Broadcasting, Inc. ("Reading")

INTRODUCTION

Telemundo is a non-party to this action, which had no involvement with this case until Reading decided to serve it with a subpoena on May 10, 2000. Despite the overbroad and unduly burdensome nature of Reading's discovery requests, Telemundo has made extraordinary efforts to cooperate in Reading's discovery efforts on a very expedited time schedule. The

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expedited time schedule was required principally because of Reading's tardiness in proceeding with discovery.

Telemundo's compliance with Reading's extensive discovery request has been a very expensive and time-consuming process. It has required many hours of tedious document review, preparation of letters, conferences with counsel and with the Presiding Officer, and preparation of pleadings. As described in Telemundo's letter dated June 9, 2000, its fees and expenses for which it sought reimbursement totaled as of that date over \$20,000. Since June 9, 2000, additional thousands of dollars in fees and expenses have been incurred in responding to Reading's further demands regarding document production, for which Telemundo also seeks payment.

Telemundo has made the eminently reasonable request that it be reimbursed by Reading for the expenses and attorney's fees for these efforts, the party that imposed the discovery demands upon Telemundo, a non-party to the proceeding. Amazingly, Reading has responded that Telemundo's attempt to be reimbursed for fees and expenses that Reading has imposed on Telemundo is a "shakedown" by Telemundo!¹

Reading has raised two objections to the imposition of fees and expenses. First, it claims that the Presiding Officer does not have the power to make such an order. This contention is patently meritless. The broad language of Section 1.313, which authorizes the Presiding Officer to issue "any orders" to protect a deponent from "expense," belies Reading's assertion that the Presiding Officer lacks the authority to grant the requested relief.

¹ See Reading Broadcasting Inc., *Opposition to Motion for Legal Fees and Costs, In re Applications of Reading Broadcasting, Inc., et. al.*, MMD Docket No. 99-153 (Jun. 8, 2000) ("*Reading Opposition*"), at 3.

Second, Reading makes various fairness arguments as to why the Presiding Officer should not exercise his discretion to impose fees and costs on Reading, the party requesting the documents. These arguments are, frankly, absurd. The fees and costs must be born by either Reading, the party demanding the documents who has created the fees and costs, or Telemundo, an innocent non-party who was dragged into this proceeding by Reading. Presumably, Reading has made the determination that the documents it has forced Telemundo to produce are so important to its case that the costs and fees resulting therefrom is warranted. Therefore, between Reading, the party creating the costs and expenses, and Telemundo, the innocent non-party, the burden should obviously fall on Reading.

ARGUMENT

A. The Presiding Officer Has Ample Authority To Issue An Order Requiring Reading To Reimburse Telemundo For The Costs And Fees Incurred As A Result Of The Subpoena.

The Presiding Officer has ample authority under Section 1.313 of the Commission's rules to require Reading to pay Telemundo's costs and expenses, including attorney's fees, involved in reviewing and producing documents pursuant to the subpoena served by Reading. Section 1.313 of the Commission's rules states:

The use of the procedures set forth in §§1.311-1.325 is subject to control by the presiding officer, who may issue any order consistent with the provisions of those sections which is appropriate and just for the purpose of protecting parties and deponents or of providing for the proper conduct of the proceeding. Whenever doing so would be conducive to the efficient and expeditious conduct of the proceeding, the presiding officer may convene a conference to hear argument and issue a ruling on any disputes that may arise under these rules. The ruling, whether written or delivered on the record at a conference, may specify any measures, including the following to assure proper conduct of the proceeding or to protect any party or deponent from annoyance, expense, embarrassment or oppression.

47 C.F.R. § 1.313 (emphasis added).

The broad language of Section 1.313 belies Readings assertion that the Presiding Officer lacks the authority to grant the requested relief. That language authorizes the Presiding Officer to issue “any orders” or specify “any measures” to protect a party from “expense.” *Id.* Moreover, the Commission has held that “the hearing examiner has been invested with broad discretionary power in applying the discovery rules.”²

In complaining that no reported decision has imposed such relief, Reading misses the point. The rules grant the Presiding Officer the authority to issue “any orders” and specify “any measures” for the purpose of protecting deponents such as Telemundo from “annoyance, expense, embarrassment or oppression,” unless such orders are inconsistent with Sections 1.311-1.325.” 47 C.F.R. § 1.313 (emphasis added). Thus, the burden of showing that the requested relief is improper rests with Reading. Insofar as Reading’s Opposition makes no demonstration that grant of the requested relief would be inconsistent with the relevant rules, Reading fails to meet this burden.

The Federal Rules of Civil Procedure, upon which the Commission’s rules are based, contain similar provisions. Rule 45 of the Federal Rules provides that orders to compel production “shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.”³ Rule 26 of the Federal Rules

² *Sumiton Broadcasting Co., Inc., et. al.*, Mem. Opin. & Order, 18 FCC 2d 78, 80 (1969). The Commission also has found that it is within the hearing examiner’s power to “preclude any use or particular uses, of these procedures in a particular case if he finds that their use will not contribute to the proper conduct of the proceeding, and he has adequate authority to prevent use of the procedures for purposes of delay and to prevent the abuse of parties or witnesses.” *Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Procedures*, Rep. & Order, 11 F.C.C. 2d 185, 187 (1968). Since the Presiding Officer has the authority, at his discretion, to completely preclude the use of such procedures, the Presiding Officer obviously has the discretion to place conditions upon their use.

³ Fed. R. Civ. P. 45(c)(2)(B).

authorizes courts to make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.”⁴

Courts addressing the issue of how the costs of subpoena compliance should be allocated have repeatedly held that, pursuant to Rules 45 and 26, non-parties should not be required to subsidize the costs of a litigation.⁵ For example, in *Linder v. Calero-Portocarrero*, 31 F. Supp. 2d 134 (D.C. Cir. 1998), the court noted that

“In addition to keeping nonparties from ‘being forced to subsidize an unreasonable share of the costs of litigation to which they were not a party,’ Rule 45’s mandatory cost-shifting provisions promote the most efficient use of resources in the discovery process. When nonparties are forced to pay the costs of discovery, the requesting party has no incentive to deter it from engaging in fishing expeditions for marginally relevant material. Requesters forced to internalize the costs of discovery will be more inclined to make narrowly-tailored requests reflecting a reasonable balance between the likely relevance of the evidence that will be discovered and the costs of compliance.”

Linder, 31 F. Supp. 2d at 136 (citing *Columbia Broadcasting System, Inc.*, 666 F.2d at 371) (emphasis added).

In this case, Reading has imposed incredibly onerous and expensive discovery requests upon Telemundo. If Reading believes that the relevance of the requested material outweighs the cost of compliance, it should be willing to pay the cost of such compliance. On the other hand, if Reading does not believe that the discovery is worth what it costs, it should not be able to inflict those improper and unnecessary costs on Telemundo.

⁴ Fed. R. Civ. P. 26(c).

⁵ See *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1981), *cert. denied*, 457 U.S. 1118, 102 S. Ct. 2929, 73 L. Ed. 2d 1329 (1982)

B. Reading's Arguments That The Presiding Officer Should Not Exercise His Discretion To Order Reading To Pay Telemundo's Costs And Fees Are Meritless.

In addition to Reading's argument that the Presiding Officer does not have the power to order it to pay Telemundo's costs and fees, Reading also presents a series of makeshift, unpersuasive arguments as to why the Presiding Officer should not exercise his discretion to order such payment. These contentions, which are addressed below, are meritless.

First, none of Reading's arguments mention, let alone address, the central equity that demands an order from the Presiding Officer requiring Reading to pay Telemundo's fees and expenses: Telemundo is a non-party, who has been required to engage in the expensive and onerous (and ultimately irrelevant) discovery solely at the demand of Reading.

Second, Reading argues that other "non-party witnesses in this case have been subject to even more burdensome requirements without any compensation for legal fees or expenses." *Reading Opposition*, at 3. These other parties did not request such reimbursement. But more fundamentally, that fact that some parties have been subject to oppressive and burdensome discovery and not obtained compensation is no basis for unfair treatment of Telemundo. To the contrary, the fact that Reading has avoided payment to other non-parties provides an additional justification for payment in this to non-party Telemundo.

Second, Reading argues that since Telemundo had to produce these documents in the federal action in Philadelphia, it should not be required to pay for them in this case. This contention is both factually and legally wrong. As Reading well knows, Telemundo made documents available to it in the federal action on May 16, 2000. Despite this, Reading insisted on production of documents in this case as well. Moreover, the fees and expenses submitted to the Presiding Officer only included half fees incurred in Dow, Lohnes & Albertson's production

to the extent that production was also relevant to the federal action, and did not include any of the fees or expenses for counsel in the Philadelphia action. Finally, the recent production of Dow, Lohnes billing records, telephone records, Swanson notes, and Swanson personal calendar have been made solely in this case. For all these reasons, Reading's objection is meritless.

CONCLUSION

For the foregoing reasons, Telemundo respectfully requests that the Presiding Officer order Reading to pay Telemundo's costs and expenses, including attorney's fees, involved in reviewing and producing documents responsive to the subpoena, and to condition the testimony of Ms. Swanson and the use of any of those documents at the hearing upon Reading's payment of such costs and expenses.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Hays", with a stylized flourish at the end.

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Date: June 15, 2000

CERTIFICATE OF SERVICE

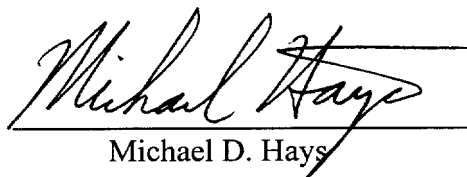
I hereby certify that, on this 15th day of June, 2000, I caused a copy of the foregoing
“Non-Party Telemundo’s Response To Reading’s Objection To Motion For Legal Fees and
Costs” to be delivered (as indicated below), addressed to the following:

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